to cases of the same character with the principal case. So, too, it has been held, that one may make a binding contract to dispose of a portion, or all his estate, in a particular manner by his will, as in the case of marriage settlements, and that a court of equity will carry the contract into effect after the decease of the testator, or even before probably, except as the party, unless limited in time by the terms of the contract, would have all his lifetime to make his will according to the stipulations of his contract, and consequently a bill during his lifetime for specific performance of the contract, would be held premature: *Johnson* v. *Hubbell*, 2 Stock. Ch. 332. We regard the case as one of special interest, in consequence of the principle involved being one of importance, and at the same time not so fully understood by the profession at large as many others of far less significance. I. F. R.

Supreme Court of the United States.

THE LOTAWANNA.

It is settled by repeated adjudications of this court, that material-men furnishing repairs and supplies to a vessel in her home port do not acquire thereby any lien upon the vessel by the general maritime law as received in the United States.

Whilst the general maritime law is the basis of the maritime law of the United States, as well as of other countries, it is only so far operative in this, or any country, as it is adopted by the laws and usages thereof. It has no inherent force of its own.

In particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole.

The general system of maritime law which was familiar to the lawyers and statesmen of this country when the Constitution was adopted, was intended, and referred to when it was declared in that instrument, that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." Thus adopted, it became the maritime law of the United States, operating uniformly in the whole country.

The question as to the true limits of maritime law and admiralty jurisdiction is exclusively a judicial question, and no state law or Act of Congress can make it broader or narrower than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it.

Semble, That Congress, under the power to regulate commerce, has authority to establish a lien on vessels of the United States in favor of material-men, uniform throughout the whole country.

In particular cases, in which Congress has not exercised the power of regulating commerce, with which it is invested by the Constitution, and where the subject does not in its nature require the exclusive exercise of that power, the states, until Congress acts, may continue to legislate.

Hence, liens granted by the laws of a state in favor of material-men for fur-

nishing necessaries to a vessel in her home port in said state are valid, though the contract to furnish the same is a maritime contract, and can only be enforced by proceedings *in rem* in the District Courts of the United States.

Any person having a specific lien on, or a vested right in, a surplus fund in court, may apply by petition for the protection of his interest under the 43d Admiralty Rule.

Separate libels were filed in 1871, against a steamboat, for wages, for salvage, for supplies furnished at her home port, and for the amount due on a mortgage: *Held*, On the evidence, that the lien for supplies had not been perfected under the state law; and, if it had been, that the libels for such supplies could not be sustained prior to the recent change in the 12th Admiralty Rule: *Held*, also, That the libel upon the mortgage could not be sustained as an original proceeding, but that the mortgagees having petitioned for the surplus proceeds of the vessel, were entitled to have the same applied to their mortgage.

APPEAL in admiralty from the Circuit Court for the District of Louisiana.

The libel was filed in the District Court of the United States on June 10th 1871, by William Doyle and another, against the steamer Lotawanna, of New Orleans, for mariners' wages. The vessel being seized, libels of intervention were afterwards filed by various parties, some for mariners' wages, some for salvage services, some for supplies, materials and repairs furnished in the port of New Orleans, for the use of the steamer. On June 20th 1871, Catharine Rodd, administratrix, and others, filed a libel of intervention by which they set up a mortgage on the vessel, given to them by the owner, on May 20th 1871, and duly recorded in the custom-house on May 22d, to secure the payment of various promissory notes of the same date, given to said libellants by the said owner, and amounting to more than $14,000.

The steamer, up to the 16th of May, had been engaged in the river trade on the Mississippi and Red rivers, between New Orleans and Jefferson, in Texas, and was laid up for repairs at New Orleans on that day. Most of the claims for wages and supplies arose before the date of the mortgage, although some arose afterwards. The steamer was sold for $7500, and, after deducting expenses of sale, costs, salvage and wages of mariners (which were admitted to have preference), there remained a surplus of $4644.42, which the District Court decreed to be paid *pro rata* to the mortgage-creditors, to the exclusion of the claims for repairs and supplies. This decree was reversed by the Circuit Court, on appeal, and the surplus was decreed to be paid *pro rata* to the claimants for repairs and supplies, to the exclusion of the mortgage-

creditors, the amount not being sufficient to pay either class of creditors in full. From the latter decree an appeal was taken to this court.

The case was argued at December Term 1873, by *T. J. Semmes*, for the appellant, and *J. A. Grow* and *L. M. Day*, for the appellees; and again at October Term 1874, by *R. Mott*, for the appellant, and *J. A. Grow*, for the appellees, and by *W. W. Goodrich*, in favor of the lien for supplies furnished a vessel in her home port, and by *William Allan Butler* and *Andrew Boardman*, in opposition to such lien.

The opinion of the court was delivered by

BRADLEY, J.—The principal questions raised in this case were decided by this court adversely to the lien more than fifty years ago in the case of *The General Smith*, 4 Wheaton 438, and that decision has ever since been adhered to, except occasionally in some of the District Courts. A solemn judgment relied on so long by the commercial community as a rule of property and the law of the land, ought not to be overruled except for very cogent reasons. If, however, in the progress of investigation, and with the new lights that have been thrown upon the whole subject of maritime law and admiralty jurisdiction, a more rational view of the question demands an adverse ruling in order to preserve harmony and logical consistency in the general system, the court might, perhaps, if no evil consequences of a glaring character were likely to ensue, feel constrained to adopt it. But if no such necessity exists, we ought not to permit any consideration of mere expediency or love of scientific completeness, to draw us into a substantial change of the received law. The additional security which has been extended to bills of sale and mortgages on ships and vessels since the passage of the act for recording them in the custom-house; and the confidence with which purchasers and mortgagees have invested money therein under the existing course of decisions on this subject, have placed a large amount of property at undue hazard, if those decisions may lightly, or without grave cause, be disturbed.

The ground on which we are asked to overrule the judgment in the case of *The General Smith* is, that by the general maritime law, those who furnish necessary materials, repairs and supplies to a vessel, upon her credit, have a lien on such a vessel therefor, as

well when furnished in her home port as when furnished in a foreign port, and that the courts of admiralty are bound to give effect to that lien.

The proposition assumes that the general maritime law governs this case, and is binding on the courts of the United States.

But it is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such; or, like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each state only so far as it is adopted therein, and with such modifications as are deemed expedient. The adoption of the common law by the several states of this Union also presents an analogous case. It is the basis of all the state laws; but is modified as each sees fit. Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common laws are by those who use them. But, like those laws, however fixed, definite and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, peculiarities exist either as to some of the rules, or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with, or shades off into the local or municipal law of the particular country, and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed—as, in justice, it should be. No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third; still, the convenience of the commercial world, bound together as it is, by mutual relations of trade and intercourse, demands that, in all essential things, wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. Hence the adoption by all commercial nations (our own included) of the

general maritime law as the basis and groundwork of all their maritime regulations. But no nation regards itself as precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of merely local and municipal consequence and do not affect other nations. It will be found, therefore, that the maritime codes of France, England, Sweden and other countries, are not one and the same in every particular; but that whilst there is a general correspondence between them arising from the fact that each adopts the essential principles, and the great mass of the general maritime law, as the basis of its system, there are varying shades of difference corresponding to the respective territories, climate and genius of the people of each country respectively. Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law. And thus it happens, that, from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common, comes to be the common maritime law of the world.

This account of the maritime law, if correct, plainly shows that, in particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole. The government of one country may be willing to give to its citizens, who supply a ship with provisions at her home port where the owner himself resides, a lien on the ship; whilst that of another country may take a contrary view as to the expediency of such a rule. The difference between them in a matter that concerns only their own citizens, in each case, cannot seriously affect the harmony and consistency of the common maritime law which each adopts and observes.

This view of the subject does not, in the slightest degree, detract from the proper authority and respect due to that venerable law of the sea, which has been the subject of such high encomiums from the ablest jurists of all countries; it merely places it upon

the just and logical grounds upon which it is accepted, and, with proper qualifications, received with the binding force of law in all countries.

The proposition, therefore, that by the general maritime law a lien is given in cases of the kind now under consideration, does not advance the argument a single step, unless it be shown to be in accordance with the maritime law as accepted and received in the United States. It certainly has not been the maritime law of England for more than two centuries past; and whether it is the maritime law of this country depends upon questions which are not answered by simply turning to the ordinary European treatises on maritime law, or the codes or ordinances of any particular country.

That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." But by what criterion are we to ascertain the precise limits of the law thus adopted? The Constitution does not define it. It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received in England; or lastly, such modification of both of these as was accepted and recognised as law in this country. Nor does the Constitution attempt to draw the boundary-line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary. It assumes that the meaning of the phrase "admiralty and maritime jurisdiction" is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of "cases in law and equity," or of "suits at common law," without defining those terms, assuming them to be known and understood.

One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the

Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.

The question is discussed with great felicity and judgment by Chief Justice TANEY, delivering the opinion of the court in the case of *The St. Lawrence*, 1 Black 526, 527, where he says: "Judicial power, in all cases of admiralty and maritime jurisdiction, is delegated by the Constitution to the Federal government in general terms, and courts of this character had then been established in all commercial and maritime nations, differing, however, materially in different countries in the powers and duties confided to them; the extent of the jurisdiction conferred depending very much upon the character of the government in which they were created; and this circumstance, with the general terms of the grant, rendered it difficult to define the exact limits of its power in the United States. This difficulty was increased by the complex character of our government, where separate and distinct specified powers of sovereignty are exercised by the United States and a state independently of each other within the same territorial limits. And the reports of the decisions of the court will show that the subject has often been before it, and carefully considered, without being able to fix with precision its definite boundaries; but certainly no state law can enlarge it, nor can an Act of Congress or rule of court make it broader than the judicial power may determine to be its true limits. And this boundary is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal government."

Guided by these sound principles, this court has felt itself at liberty to recognise the admiralty jurisdiction as extending to localities and subjects which, by the jealousy of the common law, were prohibited to it in England, but which fairly belong to it on every ground of reason when applied to the peculiar circumstances of this country, with its extended territories, its inland seas, and its navigable rivers, especially as the narrow restrictions of the English law had never prevailed on this side of the Atlantic, even in colonial times.

The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly, as Chief Justice TANEY intimates, ex-

clusively a judicial question, and no state law or Act of Congress can make it broader or (it may be added) narrower, than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it.

To ascertain, therefore, what the maritime law of this country is, it is not enough to read the French, German, Italian and other foreign works on the subject, or the codes which they have framed; but we must have regard to our own legal history, constitution, legislation, usages and adjudications as well. The decisions of this court illustrative of these sources, and giving construction to the laws and Constitution, are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed.

But we must always remember that the court cannot make the law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department. It cannot be supposed that the framers of the Constitution contemplated that the law should for ever remain unalterable. Congress undoubtedly has the authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law and that of commercial regulation are not coterminous, it is true, but the latter embraces much the largest portion of ground covered by the former. Under it Congress has regulated the registry, enrolment, license and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime. And with regard to the question now under consideration, namely, the rights of material-men in reference to supplies and repairs furnished to a vessel in her home port, there does not seem to be any great reason to doubt that Congress might adopt a uniform rule for the whole country, though, of course, this will be a matter for consideration should the question ever be directly presented for adjudication.

On this subject the remarks of Mr. Justice NELSON, in deliver-

ing the opinion of the court in *White's Bank* v. *Smith*, 7 Wall. 635, 656 (which established the validity and effect of the act respecting the recording of mortgages on vessels in the custom-house), are pertinent. He says: "Ships or vessels of the United States are creatures of the legislation of Congress. None can be denominated such, or be entitled to the benefits or privileges thereof, except those registered or enrolled according to the Act of September 1st 1789; and those which, after the last day of March 1793, shall be registered or enrolled in pursuance of the Act of 31st December 1792, and must be wholly owned by a citizen or citizens of the United States, and be commanded by a citizen of the same." * * * * "Congress having created, as it were, this species of property, and conferred upon it its chief value under the power given in the Constitution to regulate commerce, we perceive no reason for entertaining any serious doubt but that this power may be extended to the security and protection of the rights and title of all persons dealing therein. The judicial mind seems to have generally taken this direction." This case was subsequently affirmed by *Aldrich* v. *Ætna Co.*, 8 Wall. 491.

Be this, however, as it may, and whether the power of Congress is or is not sufficient to amend the law on this subject (if amendment is desirable), this court is bound to declare the law as it now stands. And according to the maritime law as accepted and received in this country, we feel bound to declare that no such lien exists as is claimed by the appellees in this case. The adjudications in this court before referred to, which it is unnecessary to review, are conclusive on the subject; and we see no sufficient ground for disturbing them.

This disposes of the principal question in the case.

But it is alleged by the appellees that by the law of Louisiana they have a privilege for their claims, giving them a lien on the vessel and her proceeds; and that the court was bound to enforce this lien in their behalf, though not strictly a maritime lien.

On examining the record, however, it appears that the appellees never caused their lien (if they had one) to be recorded according to the requirements of the state law. By the 123d article of the Constitution of Louisiana, adopted in 1869, it is declared that no "mortgage or privilege shall hereafter affect third parties, unless recorded in the parish where the property to be affected is situated." And an Act of the Legislature, passed since that time, adopts the

very terms of the constitutional provision. And a further act provides that if the privileges be not in writing, the facts on which it is based must be stated in an affidavit, which must be recorded (Revised Civil Code, articles 3273, 3274, 3093). None of these requisites having been performed, no lien can be claimed under the state law.

But if there were any doubt on this subject, the case of the appellees is met by another difficulty. The admiralty rule of 1859, which precluded the District Courts from entertaining proceedings *in rem* against domestic ships for supplies, repairs or other necessaries, was in force until May 6th 1872, when the new rule was promulgated. Now, this case was commenced in the District Court a year previous to this, and final judgment in the District Court was rendered two months previous. It is true that the judgment of the Circuit Court, on appeal, was not rendered until the 3d day of June, 1872; but if the new rule had at that time been brought to the attention of the court, it could hardly have been applied to the case in its then position. All the proceedings had been based and shaped upon other grounds and theories, and not upon the existence of that rule. It would not have been just to the other parties to apply to them a rule which was not in existence when they were carrying on the litigation.

As to the recent change in the admiralty rule referred to, it is sufficient to say, that it was simply intended to remove all obstructions and embarrassments in the way of instituting proceedings *in rem* in all cases where liens exist by law, and not to create any new lien, which, of course, this court could not do in any event, since a lien is a right of property, and not a mere matter of procedure.

Had the lien been perfected, and had the rule not stood in the way, the principles that have heretofore governed the practice of the District Courts exercising admiralty jurisdiction, and which have been repeatedly sanctioned by this court, would undoubtedly have authorized the material-men to file a libel against the vessel or its proceeds. *The General Smith*, 4 Wheat. 438; *Peyroux* v. *Howard*, 7 Peters 324; *The Orleans* v. *Phœbus*, 11 Id. 175; *The St. Lawrence*, 1 Black 522. It seems to be settled in our jurisprudence that so long as Congress does not interpose to regulate the subject, the rights of material-men furnishing necessaries to a vessel in her home port may be regulated in each state by state

legislation. State laws, it is true, cannot exclude the contract for furnishing such necessaries from the domain of admiralty jurisdiction, for it is a maritime contract, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the state courts so as to enable them to proceed *in rem* for the enforcement of liens created by such state laws, for it is exclusively conferred upon the District Courts of the United States. They can only authorize the enforcement thereof by common-law remedies, or such remedies as are equivalent thereto. But the District Courts of the United States having jurisdiction of the contract as a maritime one, may enforce liens given for its security, even when created by the state laws. The practice may be somewhat anomalous, but it has existed from the origin of the government, and, perhaps, was originally superinduced by the fact that prior to the adoption of the Constitution, liens of this sort created by state laws had been enforced by the state courts of admiralty; and as those courts were immediately succeeded by the District Courts of the United States, and in several instances the judge of the state court was transferred to the District Court, it was natural, in the infancy of federal legislation on commercial subjects, for the latter courts to entertain jurisdiction over the same classes of cases, in every respect as the state courts had done, without due regard to the new relations which the states had assumed towards the maritime law, and admiralty jurisdiction. For example, in 1784 the Legislature of Pennsylvania passed a law allowing persons concerned in building, repairing, fitting out and furnishing vessels for a voyage, to sue in admiralty, as mariners sue for wages. Two cases, those of *The Collier*, and *The Enterprise*, arising under this law, and coming before the Admiralty Court of Pennsylvania, are reported in Judge HOPKINSON'S works, volume 3, pp. 131, 171. No doubt other cases of the same kind occurred in the courts of other states.

But, whatever may have been the origin of the practice, and whether or not it was based on the soundest principles, it became firmly settled, and it is now too late to question its validity.

It is true that the inconveniences arising from the often intricate and conflicting state laws creating such liens, induced this court in December term 1858, to abrogate that portion of the 12th Admiralty Rule of 1844 which allowed proceedings *in rem* against domestic ships for repairs and supplies furnished in the home port,

and to allow proceedings *in personam* only in such cases. But we have now restored the Rule of 1844, or, rather, we have made it general in its terms, giving to material-men in all cases their option to proceed either *in rem* or *in personam*. Of course this modification of the rule cannot avail where no lien exists; but where one does exist, no matter by what law, it removes all obstacles to a proceeding *in rem*, if credit is given to the vessel.

It would undoubtedly be far more satisfactory to have a uniform law regulating such liens, but until such a law be adopted (supposing Congress to have the power) the authority of the states to legislate on the subject seems to be conceded by the uniform course of decisions.

Indeed, there is quite an extensive field of border legislation on commercial subjects (generally local in character) which may be regulated by state laws until Congress interposes and thereby excludes further state legislation. Pilotage is one of the subjects in this category. So far as Congress has interposed, its authority is supreme and exclusive; but where it has not done so, the matter is still left to the regulation of state laws. And yet this exercise by the states of the power to regulate pilotage has not withdrawn the subject, and, indeed, cannot withdraw it from the admiralty jurisdiction of the District Courts: *Cooley* v. *Port Wardens*, 12 How. 299; *Ex parte McNeill*, 13 Wall. 236. And, of, course, as before intimated, this jurisdiction of the state legislatures in such cases is subject to be terminated at any time by Congress assuming the control. In some cases this is not so desirable as in others, but in the one under consideration, if Congress has the power to intervene, it is greatly to be desired that it should do so. It would be better to have the subject regulated by the general maritime law of the country than by differing state laws. The evils arising from conflicting lien laws passed by the several states are forcibly set forth by Chief Justice TANEY in the case of *The St. Lawrence*, before cited. It may be added that the existence of secret liens is not in accord with the spirit of our commercial usages, and a uniform law by which the liens in question should be required within a reasonable time to be placed on record in the custom-house like mortgages, and otherwise properly regulated, would be of great advantage to the business community.

But there is another mode in which the appellees, if they had a valid lien, could come into the District Court and claim the benefit

thereof, namely, by a petition for the application of the surplus proceeds of the vessel to the payment of their debts, under the 43d Admiralty Rule. The court has power to distribute surplus proceeds to all those who can show a vested interest therein, in the order of their several priorities, no matter how their claims originated: *Schuckardt* v. *Babbidge*, 19 Howard 239. The propriety of such a distribution in the admiralty has been questioned on the ground that the court would thereby draw to itself equity jurisdiction: 3 Knapp's Privy Council 111. But it is a wholesome jurisdiction very commonly exercised by nearly all superior courts, to distribute a fund rightfully in its possession to those who are legally entitled to it; and there is no sound reason why admiralty courts should not do the same. If a case should be so complicated as to require the interposition of a court of equity, the District Court could refuse to act, and refer the parties to a more competent tribunal. See cases reviewed in 1 Conklin's Admiralty 48–66, 2d ed.

In this case the appellants themselves have no maritime lien, but merely a mortgage to secure an ordinary debt not founded on a maritime contract. They, therefore, have no standing in court, except under the 43d Admiralty Rule, and in the manner above indicated. Their libel was inadmissible, even under the admiralty rule as recently modified: *The John Jay*, 17 Howard 399. But before the final decree they filed a petition for the surplus proceeds, and, as there is no question in the case about fraudulent preference under the bankrupt law, they are entitled to those proceeds towards satisfaction of their mortgage.

The decree of the Circuit Court is reversed, and it is ordered that the record be remanded, with instructions to enter a decree in favor of the appellants, in conformity with this opinion.

CLIFFORD and FIELD, JJ., dissented.[1]

---

[1] We have been favored also with a copy of the elaborate dissenting opinion of CLIFFORD, J., and regret that want of space prevents our publishing it herewith.—ED. AM. L. R.